90-145

No. _____

In The

Supreme Court of the United States

October Term, 1990

JAMES J. LYONS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Whether, for Fourth Amendment purposes, the petitioner had a legitimate expectation of privacy in his padlock securing a lawfully rented storage compartment which he had permission to utilize, and whether the warrantless insertion of a key into the lock and the opening of the padlock by an agent of the government, constituted an unreasonable search.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, James J. Lyons, prays that this Honorable Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on March 13, 1990.

OPINION BELOW

The Court of Appeals' opinion in *United States v. James J. Lyons*, 898 F.2d 210 (1st Cir. 1990) [Woodlock, J., dissenting], holding that there is no expectation of privacy in personal locking devices and that a search did not occur when petitioner's padlock securing a lawfully

rented storage compartment was opened with a key. *Id.* at 212-213, is appended hereto as Appendix A. The order of the Court of Appeals denying a petition for a rehearing is appended hereto as Appendix B. No opinion was rendered by the District Court for the District of Rhode Island. That Court's findings of fact and conclusions of law regarding petitioner's motion to suppress evidence seized as a result of the search of his storage compartment is appended hereto as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 13, 1990. A timely petition for rehearing was denied on April 23, 1990. (App. 34)

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254(1).

CONSTITUTION PROVISION INVOLVED

The pertinent portion of the Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

STATEMENT OF THE CASE

Petitioner was arrested in Seekonk, Massachusetts on April 2, 1986; at which time six keys were seized from his person. Upon petitioner's detention, an F.B.I. agent traveled to the E-Z Mini Storage Company in Warwick, Rhode Island. At some point between April 2, 1986, and April 3, 1986, the agent inserted one of the seized keys into a padlock which secured storage compartment #633, operated its interior mechanism and opened the padlock. The agent did not attempt to obtain a warrant prior to opening the padlock with the key. On April 3, 1986, based on the fact that the seized key opened the padlock, the agent obtained a search warrant to search compartment #633.

On May 1, 1986, a federal grand jury sitting in the District of Rhode Island returned an eight count indictment against petitioner and a co-defendant for various drug and firearms offenses predicated upon the contraband seized from storage compartment #633. Thereafter, petitioner filed a motion to suppress all items seized on April 3, 1986, from the storage compartment. Relying on *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), petitioner claimed that the warrantless opening of the padlock securing the storage compartment was an illegal search requiring suppression. Petitioner further claimed that when the allegation that the padlock was opened was deleted from the affidavit in support of the search warrant, the government was compelled to rely upon a "bare bones" affidavit to search the compartment, requiring suppression of the items seized.

The government responded that the opening of the padlock with the key was not a "search", but rather a minimal intrusion. No exceptions to the warrant requirement were raised by the government to defend its opening of the padlock. The government did, however, assert that if the opening of the padlock was held to be a search and this fact had to be deleted from the affidavit in support of the search warrant, the warrant was still valid with this tainted information removed under the "good faith" exception.

On November 17 and 18, 1986, the District Court conducted an evidentiary hearing on petitioner's motion to suppress. Petitioner testified that Lawrence Gallo lawfully rented storage compartment #633 in March of 1986, and gave him permission to use the compartment. Petitioner further testified that he paid Gallo the rental fee, purchased a padlock and personally placed this padlock on the compartment. Moreover, petitioner had sole and complete dominion and control of the compartment, as well as, the padlock securing it and he had the only two keys to it in his possession at all times. Petitioner also testified that besides himself, no one was able to enter the compartment or operate the padlock securing it and that he expected that the compartment would be his private area.

The government conceded that petitioner had an expectation of privacy in the compartment's contents. The government argued that there was no expectation of privacy in the padlock securing the compartment and that the opening of the padlock was a minimal intrusion which identified the padlock's owner.

The District Court, without the subsequent guidance of this Court's holding in *Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), held that although a close question, the opening of the padlock was a minimal intrusion and not a "search" and denied petitioner's motion to suppress. (App. 42)

Petitioner entered into a stipulation of facts; he was convicted on each count of the indictment and sentenced to aggregated terms of forty years imprisonment. The District Court subsequently observed that if the opening of the padlock is ultimately held to be a search, the prosecution of the present indictment would be barred.

Petitioner appealed to the Court of Appeals for the First Circuit pursuant to 28 U.S.C. sec. 1291 and a divided court affirmed the District Court's denial of his motion to suppress. In its decision, the majority acknowledged that whether or not the government's opening of petitioner's padlock was a search implicating an expectation of privacy is a "tricky question", *United States v. Lyons*, supra at 212 (App. 4) and proceeded to adopt the District Court's reasoning. In a lengthly dissent, District Judge Woodlock emphasized that each of the justifications utilized by the majority to affirm petitioner's conviction were recently explicitly rejected by this Court in *Arizona v. Hicks*. *United States v. Lyons*, supra at 218 (App. 20). Judge Woodlock also noted that petitioner, " . . . had taken all steps necessary" to ensure a legitimate expectation of privacy in his padlock and that the search warrant was not supported by probable cause if the warrantless search of the padlock was suppressed. *Id.* at 219,222 (App. 21, 28-29).

REASONS FOR GRANTING THE WRIT

1. The decision of the majority of the Court of Appeals is in direct conflict with the recent decision of this Court in *Arizona v. Hicks*, supra. District Judge Woodlock in his dissent, which is difficult to improve upon, notes that the majority of the Court of Appeals has adopted the positions of the dissents of Justice O'Connor and Justice Powell in *Arizona v. Hicks*, supra, to affirm petitioner's conviction. The opinion of the majority below can only be characterized as an invitation to this Court to reconsider and overrule the rationale of its holding in *Hicks*, supra.

The majority below has violated the brightline rule of *Hicks*, supra. By holding that the opening of the padlock securing the storage compartment is not a search implicating an expectation of privacy, the Court of Appeals has given rise to that specific "creature" this Court sought not to create in *Arizona v. Hicks*, supra:

> We are unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a 'creature' of uncertain description that is neither a plain view inspection nor yet a full-blown search.
>
> *Id.* 480 U.S. at 328

This Court, in *Arizona v. Hicks*, supra, addressed two propositions: firstly, that probable cause is a prerequisite to a lawful search under the plain view doctrine. The plain view doctrine is not involved in this matter. The second proposition, which is explicitly raised by the instant petition and which the majority below failed to recognize, is that physically moving or disturbing personal items entails a search implicating an expectation of

privacy. This Court created a bright-line rule as a, " . . . search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Id.* at 325. If merely moving the stolen stereo in *Hicks* to "identify" it, constituted an unreasonable search, then the opening of petitioner's padlock securing his storage compartment containing his personal effects to "identify" it, is more obviously an unreasonable "search."

This Court has implicitly recognized a reasonable expectation of privacy in the use of locks and padlocks by observing that:

> By placing personal effects inside a double locked footlocker, respondents manifested an expectation of privacy that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.
>
> *United States v. Chadwick, supra,* 433 U.S. at 11

The majority of the Court of Appeals also fails to adhere to the principles enunicated by now Chief Justice Rehnquist in *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). In distinguishing the search in *Rakas,* the Court discussed the legitimate expectation of privacy that the defendant had enjoyed in *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). Jones had received permission to use a friend's apartment and he also retained a key to the apartment. Chief Justice Rhenquist explained that *Jones,* "had complete dominion and control over the apartment" and he could, "legitimately

expect privacy in the areas which were subject to the searches and siezures each sought to contest." *Rakas v. Illinois*, supra, 439 U.S. at 149.

Identical facts are presented in the instant case by petitioner, who similarly had permission to use storage compartment #633. Petitioner, however, presents several additional grounds for his expectation of privacy as he purchased and owned the padlock securing the compartment, he possessed the only two keys to the lock at all times and he allowed no one besides himself access to the padlock or compartment. "One who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude [others] . . . ". *Rakas v. Illinois, Id.*, 439 U.S. at 143, n.12.

The majority below candidly concedes that petitioner had a legitimate expectation of privacy in the contents of the storage compartment, but fails to recognize that the padlock securing it from intruders is an indefeasible component of the compartment. Petitioner unequivocally has "demonstrated a legitimate expectation of privacy in the area searched," the concealed secretive interior mechanism of his personal padlock. *Rakas v. Illinois, Id.* 439 U.S. at 148-149.

The case law relied on by the majority below, as District Judge Woodlock notes in his dissent, is seriously misplaced as each of those decisions were rendered prior to *Arizona v. Hicks*, supra and accordingly do not reflect the *Hicks* analysis. *United States v. Lyons*, supra at 220 (App. 24) Moreover, as *Hicks*, holds, there is a very bright line between the cursory examination of information in

"plain view" without disturbing it and physically unlocking the concealed interior mechanism of a padlock used for personal security.

Hicks, *Rakas*, and *Chadwick* compel the conclusion that an unreasonable warrantless search requiring suppression occurred when petitioner's padlock was opened with a key. Petitioner's conviction should have been reversed.

2. National Importance of the Case. The genesis of the Fourth Amendment has evolved from the indefeasible rights in personal security, personal liberty, and personal property. The holding that there is no expectation of privacy in locking devices, the very epitome of an expectation of privacy, tears at the heart of the Fourth Amendment. The impact of the Court of Appeals decision extends far beyond the harm to the petitioner, as locking devices are an essential ingredient of our modern society. The societal importance of locks and our belief in the security they provide is undermined by the reasoning of the Court of Appeals. Locking devices are used to secure everything from classified information and the vaults of our banking system to our front doors for personal protection. The size of the industrial concerns which manufacture and maintain these devices bears testament to their importance in our society. In the face of these interests and beliefs, the decision below allows governmental agents without a warrant to lawfully use keys, picks, or other implements to unlock a personal locking device utilized by any member of our society under the guise of an identification procedure. To allow the holding below that the agent's insertion of the key and the opening of petitioner's padlock was not a search, to stand, would be

to create that creature that this Court sought to prohibit in *Arizona v. Hicks*, supra, 480 U.S. at 328. Petitioner had a reasonable expectation of privacy in his padlock which secured his storage compartment. The issues raised by the instant petition are extremely crucial for the preservation of the rights bestowed by the Fourth Amendment for once a lock is opened, it is no longer a lock. The majority decision below, allows, " . . . keys to be issued without a warrant to explore the concealed interiors of the guardian mechanisms people employ in their efforts to make private those places and things over which they exercise dominion and control" *United States v. Lyons*, Woodlock, J., dissent, supra at 223 (App. 32).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Indeed, so clear is the error of the Court of Appeals, that petitioner respectfully asserts that appropriate relief would be the summary reversal of the decision of that Court. Such relief is consistent with this Court's practice in cases not only where the law is well settled by a prior decision, but also in cases where the action of the lower court is clearly improper.

Respectfully submitted
By his attorney,

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July 19, 1990

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1575

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES J. LYONS,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

[Hon. Francis J. Boyle, *U.S. District Judge*]

Before

Campbell, *Chief Judge*,
Torruella, *Circuit Judge*,
and Woodlock,* *District Judge*.

Bernard Grossberg for appellant.

Kenneth P. Madden, Assistant United States Attorney, with whom *Lincoln C. Almond*, United States Attorney, and *Margaret E. Curran*, Assistant United States Attorney, were on brief for the United States.

MARCH 13, 1990

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*Of the District of Massachusetts, sitting by designation.

TORRUELLA, *Circuit Judge*, James Lyons appeals his conviction on eight counts of an indictment arising from the seizure of large quantities of cash, cocaine, weapons and explosives. Most of these items were removed from two storage compartments. Lyons raises four issues as grounds for reversal: (I) that the insertion of a key into the padlock securing one of the storage compartments was an unreasonable search; (II) that his pretrial stipulation of facts was an unknowing and involuntary waiver of his right to cross examine witnesses; (III) that the court erred in failing to appoint counsel to represent him on his post-conviction motion for a new trial; and (IV) that his sentencing hearing was improper.

We consider his contentions seriatim.

I. The Padlock to Storage Unit #633

-A-

Lyons was arrested on April 2, 1986, in Seekonk, Massachusetts, by FBI agents pursuant to an arrest warrant issued September 12, 1985, involving drug trafficking charges. At that time of his arrest, the agents seized the Oldsmobile he had been driving and the suitcase he was carrying. A search of his person incident to his arrest yielded a collection of six keys, among which were two standard padlock keys with no distinctive markings. The suitcase was searched later that day pursuant to a search warrant and among the items found was a rental agreement in the name of John North from the E-Z Mini Storage Company in Warwick, Rhode Island, ("E-Z/Warwick") for storage compartment #792.

On April 2, prior to the search of the suitcase – and apparently by means other than knowledge of the compartment #792 rental agreement[1] certain FBI agents made their way to E-Z/Warwick. The proprietor at E-Z/Warwick positively identified Lyons from a photograph "as a person being present on the premises." A review of E-Z/Warwick rental records showed that locker #633 was rented in the name of Larry Gallo, whom the agents understood through informant information to be an associate of Lyons. Based on this information, the agents inserted one of the keys they had seized from Lyons earlier that day into the padlock securing compartment #633. The key turned the tumbler; the agents then relocked the padlock without opening the compartment, and left the premises to apply for a search warrant. The compartment itself was opened April 3 when a warrant was obtained. The search of the compartment #633 yielded a cache of cocaine and weapons.

On April 4, the automobile Lyons had been driving when arrested was searched pursuant to a search warrant and E-Z/Warwick rental documents for storage unit #633 in the name of Larry Gallo were seized.

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[1] Because of the manner in which the district court resolved the issues, the record does not fully develop the facts relating to how the agents came to make their way to E-Z/Warwick. The record does, however, indicate that the discovery of the storage compartment #792 rental agreement seized in the suitcase search did not play a role in initially bringing agents to that facility.

-B-

Appellant challenges the insertion of the key into the lock to storage compartment #633 as a warrantless and unreasonable search. The district court ruled that the insertion of a key into a lock solely for the purposes of identifying ownership, as in this case, did not constitute a search at all. We agree.

"A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," *Katz v. United States*, 389 U.S. 347, 351 (1967) because public exposure vitiates any reasonable expectation of privacy. Certainly, whether trying the key in order to identify the lock's owner was a "search" is a tricky question. But even if it was a search, it was a unique form of one which, as in the case of a sniff by a dog, and is not unreasonable because there is no expectation of privacy involved. *United States v. Place*, 462 U.S. 696 (1983).

In *United States v. DeBardeleben*, 740 F.2d 440 (6th Cir. 1984), *cert. denied*, 469 U.S. 1028 (1984), the defendant was arrested for passing counterfeit currency at a shopping mall. Incident to his arrest, a collection of car keys was seized from the defendant. After the mall closed, agents returned to the parking lot and saw three cars. The license plate for one vehicle was not on file. Using the keys seized from the defendant, the agents were able to unlock the passenger door lock and the trunk lock of the vehicle. The agents immediately locked the passenger

door without opening it and closed the trunk without examination of its contents. A warrant to search the vehicle was later obtained. The Sixth Circuit, holding that the agents acted reasonably to identify the proper vehicle to search, id., n.1, p. 443, said:

> In the instant case, the insertion of the keys into the Chrysler was merely a minimal intrusion, justified by a 'founded suspicion' and by the legitimate crime investigation. The agent, acting on a reasonable belief that the car belonged to defendant, did not *search* the Chrysler but merely *identified* it as belonging to defendant. Defendant by the use of a stolen license plate prevented the agent from using that method of determining ownership.

Id. at 445.

In the instant case, the insertion of the key into the padlock was merely a means of identifying a storage unit to which Lyons had access. Just as the vehicle in *DeBardeleben* was not registered to that defendant, the storage unit in this case was not leased in Lyons' name. Just as the contents of the vehicle in *DeBardeleben* were not searched or seized prior to the issuance of the search warrant, neither were the contents of the storage unit searched or seized prior to the issuance of the search warrant.

During the suppression hearing, Lyons testified as follows concerning the storage unit:

Q. Was the area did that area contain items which were yours?

A. Yes, it did.

Q. Did you expect that that area would be your private area?

A. Yes, I did. . . .

Q. And you wanted to secure what was inside of the bin; is that right?

A. Yes.

Clearly, the padlock was placed on the door to protect the contents of the storage unit. When viewed objectively, it is those contents that are the object of the lessee's privacy expectations, not the padlock. By placing personal effects inside the storage unit, Lyons manifested an expectation that the *contents* would be free from public view. *See United States v. Chadwick*, 433 U.S. 1, 11 (1976). We conclude that this course of investigation did not constitute a search. *United States v. Place*, 462 U.S. at 707, or at least, not an unreasonable search protected by the Fourth Amendment.

Since we find that the insertion of the key into the padlock was not a search, Lyons argument that the affidavit in support of the search warrant did not establish probable cause because it relied on the allegedly tainted information gathered from the padlock, fails.[2]

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[2] In *Arizona v. Hicks*, 480 U.S. 321 (1987), the Supreme Court held that, absent probable cause, the "plain view" doctrine did not permit police officers to move some stereo components slightly to reveal the serial numbers underneath. *See id.* at 325 ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable."). In the present case, defendant argues that the "plain view" doctrine also did not permit the police officers to test defendant's key with the storage lock.

We decline to address this issue because we do not rest our holding on the "plain view" exception to the warrant requirement, nor do we undertake to enlarge the contours of that

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II. Stipulation of Facts

Prior to trial, on November 25, 1986, Lyons, his counsel, and the Government signed a stipulation of facts and expressly waived his right to trial by jury. Several days later on December 1, 1986, after a lengthy colloquy between Lyons and the trial judge regarding Lyons' understanding of the stipulation and his various waivers, the trial judge found Lyons "thoroughly competent" and his waiver voluntary. After accepting the waiver, the trial judge inquired whether either party wished to be heard further. Neither the government nor Lyons' counsel requested that opportunity and the trial judge found Lyons guilty on all counts. Lyons made no objection at that time. However, on December 19, 1986, he filed a motion for a new trial in which he contended that because his custodial treatment rendered his "brain [. . .]like a marshmallow," his stipulation was not knowing and voluntary.

A review of the colloquy demonstrates that the trial judge made full inquiry concerning the voluntariness of Lyons' choice to submit the case on stipulated facts. This colloquy included (1) a forewarning to the defendant that the court could decide the case on the stipulated facts

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exception. Instead, we hold that the insertion of a key into a lock, followed by the turning of its tumbler in order to determine the fit, is so minimally intrusive that it does not implicate a reasonable expectation of privacy. *See United States v. Place*, 462 U.S. 696, 707 (holding that the exposure of defendant's luggage, which was located in a public place, to a trained canine does not constitute a search within the meaning of the Fourth Amendment).

alone and could find him guilty on that basis and (2) inquiry of defendant's counsel in defendant's presence whether he wished to be heard further.[3]

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[3] The colloquy included the following:

THE COURT:	And I'm going to ask you, please – hand this to the Defendant, please. Handing you a document from the file which bears the signature James Lyons on the last page, have you seen that before?
MR. LYONS:	Yes.
THE COURT:	And is that your signature?
MR. LYONS:	Yes.
THE COURT:	And did you put that, your signature on that page?
MR. LYONS:	Yes.
THE COURT:	On the 25th of November?
MR. LYONS:	Yes.
THE COURT:	Did you read that document before you signed it?
MR. LYONS:	Yes.
THE COURT:	Did you understand that you were not required to sign it?
MR. LYONS:	Yes.
THE COURT:	Did you take this action voluntarily?
MR. LYONS:	Yes.

(Continued on following page)

Lyons argues now, however, that the colloquy failed to touch upon the effect of the stipulation on his right to cross examine witnesses and was, therefore, inadequate. He contends that a full blown inquiry under Fed. R. Crim. P. 11(c) (3) was required as a matter of law to determine whether his waiver was voluntary and knowing because his trial by stipulation was equivalent to a plea of guilty. A Rule 11 inquiry is mandated when a

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THE COURT:	Do you understand that on the basis of that statement that I could decide this case and could find you guilty of all the charges contained in the indictment?
MR. LYONS:	Yes.
THE COURT:	Did you have that understanding before you signed it?
MR. LYONS:	Yes.
	[. . .]
THE COURT:	I'm going to enter this stipulation. Counsel wish to be heard?
	[. . .]
THE COURT:	Does this stipulation contain facts upon which the Defendant must be found guilty on all counts of the indictment?
MR. MADDEN:	Yes, your Honor.
THE COURT:	Do you wish to be heard, Mr. Egbert?
MR. EGBERT:	I do not, your Honor.

defendant by plea does not contest a guilty finding; a court's noncompliance with that mandate can constitute reversible error. *McCarthy v. United States*, 394 U.S. 459, 471-72 (1969); *Mack v. United States*, 635 F.2d 20, 24 (1st Cir. 1980).[4] However, Rule 11 does not by its terms apply to circumstances other than formal pleas of guilty or *nolo contendere*.

Trial stipulations can run the gamut from modest accommodations designed to avoid unnecessary consumption of time in resolving minor matters over which there is no true contest to agreements which are the functional equivalent of a guilty plea.[5] Justice Harlan marked this spectrum as encompassing, on the one hand, an "agreement between . . . counsel and the trial court . . . involv[ing] no more than a matter of trial procedure" to, on the other hand, the structuring of a proceeding "involv[ing] so significant a surrender of the rights normally incident to a trial that it amounted almost to a plea of guilty or *nolo contendere*." *Brookhart v. Janis*, 384 U.S. 1, 8-9 (1966) (separate opinion of Harlan, J.).

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[4] The addition of Fed. R. Crim. P. 11(h) in 1983, which provides that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded," put in question the *per se* reversible error standard articulated in *McCarthy* and *Mack*. *United States v. Goldberg*, 862 F.2d 101, 106 (6th Cir. 1988).

[5] The need for the use of trial by stipulation in order to preserve appellate issues has been diminished as a result of the 1983 amendment to Rule 11, which now permits a conditional plea of guilty. The new conditional plea provision, Fed. R. Crim. P. 11(a)(2) allows a defendant to reserve the right to

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We have not had occasion to decide whether, when, or to what degree a trial stipulation must be accompanied by the full panoply of advices required under Rule 11 for a guilty plea. Other circuits, however, have been reluctant to mandate a complete Rule 11 inquiry when faced with a pretrial stipulation even if that stipulation contains all the facts necessary for a determination of guilt. *See, e.g., United States v. Schmidt*, 760 F.2d 828, 83435 (7th Cir.), *cert. denied*, 474 U.S. 827 (1985); *United States v. Schuster*, 734 F.2d 424 (9th Cir.), *cert. denied*, 469 U.S. 1189 (1984); *United States v. Robertson*, 698 F.2d 703, 707-09 (5th Cir. # 1983); *United States v. Stalder*, 696 F.2d 59 (8th Cir. 1982); *United States v. Lawson*, 682 F.2d 1012 (D.C. Cir. 1982); *Witherspoon v. United States*, 633 F.2d 1247 (6th Cir. 1980),

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appeal an adverse determination of a pre-trial motion and permits the defendant to withdraw his plea if he prevails on appeal. Rule 11(a)(2) requires the approval of the court and the consent of the government before a conditional plea can be entered. The record does not disclose whether the conditional plea avenue was explored by the defendant here. Even after the adoption of Rule 11(a)(2), however, there remain a number of reasons why trial by stipulation would be used rather than conditional plea: for example, the necessary approval and consent of the court and the government may not be forthcoming; the defendant may be seeking to preserve for appeal a question of sufficiency evidence rather than merely a pre-trial ruling issue; the defendant may wish to demonstrate some degree of acceptance of responsibility as a mitigating factor at sentencing by agreeing to steps which minimize the consumption of time in the disposition of his case; or the defendant may be interested in controlling the evidence regarding his actions which the trial judge evaluates in order to limit the judge's exposure to aggravating circumstances which may be developed more vividly during live testimony at a full trial.

cert. denied, 450 U.S. 933 (1981). *See generally Annotation: Standards of Rule 11 of Federal Rules of Criminal Procedure, Requiring Personal Advice to Accused From Court Before Acceptance of Guilty Plea, As Applicable Where Accused's Stipulation or Testimony Allegedly Amounts to Guilty Plea*, 53 A.L.R. FED. 919 (1981 & 1989 Supp.).

We too decline to extend Rule 11 to cover trial by stipulation. The proper approach, and the one we adopt, is that first articulated by the District of Columbia Circuit in *United States v. Strothers*, 578 F.2d 397, 404 (D.C. Cir. 1978):

> [W]aiver of jury trial in this context is freighted with what is perhaps more than ordinary significance, and the trial judge should arguably be at some special pains to satisfy himself that the defendant is fully informed about precisely what it is that he is giving up. One way of doing that would be to take heed of at least some of the advices enumerated in Rule 11(c) . . . [to] impress[] upon defendant the significance of the choice he has purportedly made.

We thus look to the record in this case to determine whether the district judge took "special pains to satisfy himself" that the waiver was knowing and voluntary to impress upon the defendant the significance of the choice to proceed by stipulation. Here, as the partial colloquy set forth in note 4 *supra* illustrates, the district judge made extensive and pertinent inquiry of Lyons prior to accepting the stipulation, and the record demonstrates that Lyons satisfied the judge that he understood the nature and scope of his stipulation. *Cf. Brookhart v. Janis*, 384 U.S. 1 (1966) (defendant did not knowingly waive rights when he kept insisting he was not making equivalent of guilty

plea). Lyons' belated complaint regarding the stipulation seems wholly contrived to relieve him of the consequences of his decision. The record fully supports the trial judge's finding on the defendant's motion for a new trial that Lyons

> was thoroughly competent to make the decision that he did and that he took the action voluntarily . . . [The] Defendant knew and understood the proceedings against him and he possessed the ability to consult with his lawyer with a reasonable degree of rational understanding. His present protestations are obviously the result of afterthought and the hope that somehow his present predicament can be improved. The Defendant's responses demonstrate clearly that his "marshmallow" analogy lacks an essential ingredient, that of truth.

Of course, there is no harm in conducting a complete Rule 11 inquiry particularly when a trial stipulation contains all the facts necessary for a guilty finding. But that particular form of inquiry is not mandated so long as the trial judge conducts a colloquy with the defendant sufficient to demonstrate that this defendant has executed the stipulation freely with knowledge of the consequences of what he is doing. We hold that the trial judge's inquiry here to determine whether Lyons' stipulation was knowing and voluntary was fully sufficient and find no extraordinary circumstances to justify permitting the defendant to withdraw the considered decision he made with the advice of counsel regarding the manner of proceeding on the charges against him.

III. Appointment of Counsel on the New Trial Motion

After his conviction, Lyons moved *pro se* for appointment of new counsel under 18 U.S.C. § 3006A. Lyons'

counsel at the time filed a motion to withdraw which the district court refused to allow until new counsel filed an appearance. At a hearing on the motion for appointment of new counsel, Lyons filed an affidavit of indigency which the Government contested, pointing to a claim filed by Lyons in response to a forfeiture complaint with respect to $318,000 that had been seized in connection with his arrest. Lyons was called to substantiate the affidavit through testimony and he invoked his fifth amendment privilege. In denying the § 3006A motion, the district court observed that Lyons had had appointed counsel at the beginning of the proceedings against him but had later elected to retain private counsel instead, thereby suggesting he was not indigent.

The district court ruled that while Lyons had the right to invoke the Fifth Amendment, that privilege could not "be used as a shield to avoid disclosure of assets." *Cf. United States v. Krzyske*, 836 F.2d 1013, 1018-19 (6th Cir.), *cert. denied*, 109 S. Ct. 89 (1988) (defendant cannot decline to present additional information about indigency when any conflict with fifth amendment "is speculative and prospective only"). The district court thereafter denied the Motion to Proceed *in forma pauperis* on March 27, 1987. The district court then took up the motion for a new trial at a hearing on May 11, 1987, at which the attorneys previously retained by Lyons appeared. In a comprehensive Opinion issued June 17, 1987, the trial judge denied Lyons' motion for a new trial.[6]

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[6] Appellant also argues that the Government's failure to hold him in a facility closer to Rhode Island and his repeated

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The dispute over Lyons' right to proceed *in forma pauperis* was reignited in connection with his appeal. Upon Lyons' motion to proceed *in forma pauperis* on appeal, the trial judge ordered appellant's private counsel to disclose their fee arrangement, an order which appellant attempted unsuccessfully to have reviewed in this court. Once the fee arrangement had been disclosed, the district court denied the *in forma pauperis* application on appeal and ordered counsel to remit $7,000 to Lyons so that he might hire new counsel to represent him on appeal.

In prior proceedings in this case, we held that the district court has "jurisdiction to make inquiries which are necessary and relevant to an evaluation of a party's alleged inability to pay," *In re James Lyons*, No. 87-8042, (1st Cir. Sept. 10, 1987) at 2. This is a determination that will "not be lightly overturned." *United States v. Harris*, 707 F.2d 653, 660 (2d Cir.), *cert. denied*, 464 U.S 997 (1983).

Deference to the district court is especially appropriate in this area. The opportunities are manifest for disappointed defendants to manipulate the timing of

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transfers denied him effective assistance of counsel before trial. This contention is without merit. We agree with the district judge that appellant's reliance on *Cobb v. Aytch*, 643 F.2d 946 (3rd Cir. 1981), is misplaced. *Cobb* was premised on a finding that the relationship between the pretrial detainees and their counsel had been prejudiced by their transfers, *id.*, an element entirely missing from this case. In fact, as the trial judge below stated, there was "absolutely nothing to show that the assistance rendered to the defendant by counsel was less than professionally competent." Appellant's motion for new trial was correctly denied on the merits.

proceedings and to open new fronts for attack on previous rulings by efforts to discharge counsel and seek new counsel. It is perhaps a testament to the high regard in which attorneys available for appointment under the Criminal Justice Act are held that claims of indigency are used to assist in this manipulation. The trial judge is in the best position to evaluate whether the desire for new and appointed counsel is well founded. We recognize, of course, the need to assure that the right to counsel not be infringed. But "the important right to counsel of choice is not absolute; it must be balanced against the court's authority to control its own docket, and a court must beware that a demand for counsel may be utilized as a way to delay proceedings or trifle with the court." *Krzyske*, 836 F.2d at 1013. Restraints on periodic efforts to change counsel are necessary to ensure that the "right [to counsel] is not manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice." *United v. States v. Allen*, 789 F.2d 90, 92 n.4 (1st Cir. 1986).

The district court's rulings on the *in forma pauperis* issue as it relates to appeal have already been affirmed by this court. *United States v. Lyons*, No. 87-1575, slip op. (1st Cir. Nov. 24, 1987) (concurring in denial of appellant's motion to proceed *in forma pauperis* and affirming the $7,000 refund). We similarly affirm the district court's earlier resolution of Lyons' *in forma pauperis* request as it related to the motion for a new trial.

IV. The Sentencing Hearing

A. Matters Considered

At his sentencing hearing, appellant objected to a paragraph in his presentence report which stated that he

intended to bomb state police barracks in Rhode Island. Upon that objection the sentencing judge was required to make a finding of fact as to the allegation of inaccuracy, or alternatively to determine that no finding was necessary because "the matter controverted w[ould] not be taken into account in sentencing." Fed. R. Crim P. 32(c)(3)(D). The judge was further required to append a written record of his finding or determination to the presentence report. *Id.*

In this case, the district judge merely made a note in the presentence report that appellant denied the bombing plan. This did not meet the requirements of Rule 32(c)(3)(D).

Because it is unclear whether the challenged information affected the nature or length of the sentence imposed on appellant remand is necessary on that issue. *See generally United States v. López-Peña*, No. 87-2003, slip op. at 17 (1st Cir. Nov. 22, 1989). *United States v. Levy*, 870 F.2d 37, 39 (1st Cir. 1989); *United States v. Jiménez-Rivera*, 842 F.2d 545, 551-52 (1st Cir.), *cert. denied*, 108 S. Ct. 2882 (1988); *United States v. Serino*, 835 F.2d 924, 932 (1st Cir. 1987). We do not order a new sentencing hearing at this time. If on remand the district court indicates it did not rely on the disputed information, it will make that determination in writing and append it to the presentence report. *Jimenez-Rivera*, 842 F.2d at 552. If the court did rely on the information, however, it will "vacate the sentence and hold a new sentencing hearing" in compliance with the rule. *Id.*

B. Conduct of Hearing

Appellant also challenges his sentencing hearing on grounds he was denied his rights to counsel and to

present mitigating evidence. Appellant's contentions are meritless. Not only was he represented by counsel who spoke on his behalf, but his counsel (Edward J. Romano) spoke vigorously and pointedly – notwithstanding the reluctance he expressed at the beginning of the hearing to continue to represent appellant pending disposition of his motion to withdraw as counsel. Appellant has failed to overcome the heavy presumption of adequate representation articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), nor has he shown any prejudice resulting from his counsel's alleged inadequacy. *Id.* at 693.

Similarly, appellant's contention that he was denied the opportunity to present mitigating evidence does not withstand scrutiny. Mr. Romano addressed the court at length regarding appellant's troubled childhood and background. Appellant has set forth no other factors he would have presented to mitigate the outcome.

Affirmed, but remanded for action consistent with Part IV-A above.

WOODLOCK, *District Judge* (dissenting). It is tempting to treat the mere turning of the key to the padlock for storage compartment #633 as an investigative step not rising to the level of Fourth Amendment concern. That, in essence, is the way the district court treated this step when it ruled that the insertion of a key into a lock solely for purposes of identifying ownership did not constitute a search at all.

Such a treatment, however, creates significant conceptual difficulties, as the majority recognizes with its candid observation that "whether trying the key in order to identify the lock's owner was a 'search' is a tricky

question." *Ante*, at 4. The conceptual trick can be avoided, I believe, by adherence to recent Supreme Court precedent.

In *Arizona v. Hicks*, 480 U.S. 321 (1987), the Supreme Court focused Fourth Amendment concerns in this context on whether the investigative step at issue involves the physical exploration and manipulation of the concealed aspects of an object only the exterior of which is exposed. The investigative step here involved just such exploration and manipulation. *Hicks* compels the conclusion that the investigative step at issue in this case was a search for which a warrant was a necessary precondition.

Accordingly, while I join in parts I.A., II, III and IV of the majority opinion, I respectfully dissent from part I.B. and write separately to set forth the bases for my view that this case should be remanded to the district court for further proceedings on the Fourth Amendment issue.

I

Hicks, an opinion handed down after the trial judge's ruling in this case and thus unavailable to him for guidance, is the current touchstone for this area of Fourth Amendment law. In *Hicks* the Supreme Court held that the mere act of moving some stereo components slightly – to reveal the serial numbers underneath – constituted a search. In the words of the Supreme Court, "A search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Id.* at 325.

However, here the majority of this court holds that an intrusion into a padlock which merely discloses whether

a particular key can open the mechanism is not a search. The majority offers an alternative holding as well: that "even if it was a search, it was . . . not unreasonable because there is no expectation of privacy involved." *Ante*, at 4. The Supreme Court in *Hicks* declined to accept either of the two alternative rationales the majority articulates for avoiding the warrant requirement of the Fourth Amendment.

The Court rejected Justice O'Connor's characterization of the officers' actions as a "cursory inspection," not implicating a "full blown search." *See id.* at 333 (O'Connor, J., dissenting). Justice O'Connor's characterization is paralleled by the lower court holding and the first alternative ground adopted by the majority in this case. The Court also rejected Justice Powell's suggestion – paralleled by the second alternative adopted by the majority – that a modest dislocation of an object in plain view would be reasonable under the Fourth Amendment. *See id.* at 330 (Powell, J., dissenting). The Court instead found that "the 'distinction between "looking" at a suspicious object in plain view and "moving" it even a few inches' is much more than trivial for purposes of the Fourth Amendment." *Id.* at 325 (quoting dissent of Powell, J., at 333).

The padlock at issue here – no less than the stereo component in *Hicks* – was an "effect" within the meaning of the Fourth Amendment and Lyons had a legitimate expectation of privacy regarding it. While the primary expectation of privacy was attached to the storage compartment itself, the lock was an indefeasible component of that compartment: without a secure lock, the expectation of privacy in the compartment would be significantly

diminished. Moreover, Lyons had a reasonable expectation of privacy in the use of the lock itself. It was his private lock; he held the only keys and there was no master key on file. The internal mechanism of the lock was not exposed to outside view; the nature of a padlock is such that it is meant to remain closed unless opened by a person authorized by the owner to make use of the key. Lyons had taken all steps necessary to secure a reasonable expectation of privacy in his identity as the owner of the lock with access to the compartment. It parses too fine to distinguish between a reasonable expectation of privacy in the objects and places a lock secures and a reasonable expectation of privacy in the lock's interior mechanism.

I need not resort to elaborate metaphor to evoke the fundamental function of lock and key to guard those effects which persons seek to keep private. Indeed, the use of a lock is a classic sign that an expectation of privacy legitimately attends the location of a person's effects. "No less than one who locks the doors of his home against intruders, one who safeguards his possessions [by locking them in a private storage compartment] is due the protection of the Fourth Amendment Warrant Clause." *United States v. Chadwick*, 433 U.S. 1, 11 (1977). Society considers the objects a person seeks to keep under lock and key to be at the very heart of the class of effects for which an expectation of privacy is reasonable. The penetration and manipulation – cursory or sustained, modest or substantial – of the guardian mechanisms of that heartland is no trivial matter for Fourth Amendment purposes. It is a search in its own right irrespective of whether, as here, it also provides evidence supporting –

and is thus the initial stage of – the search of the compartment whose privacy the mechanism guards.

Following *Hicks*, I would conclude that attempting to identify ownership of a private storage compartment by means of the penetration and manipulation of a padlock constitutes a search requiring a warrant unless there is an "acceptable reason for bypassing the usual constraints of the fourth amendment." *United States v. Curzi*, 867 F.2d 36, 41 (1st Cir. 1989). I can find none.

I recognize, as the Supreme Court observed last term, that "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner v. Railway Labor Executives Ass'n.*, 109 S.Ct.1402, 1414 (1989). The reasonableness of a search "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). But "[i]n most criminal cases[,] this balance [is struck] in favor of the procedures described by the Warrant Clause of the Fourth Amendment." *Id.* Thus, "[e]xcept in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *Id.* The exceptions arise "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 3167 (1987) (citation omitted)). Here there is neither a special need nor a showing that the requirements of the Warrant Clause are impracticable.

In affirming the district court's decision, the majority relies upon case law which has melded the definition of a search with a perceived special need of law enforcement personnel to use keys to discover the identity of the ownership of certain locked premises and effects.

Thus, the majority suggests that appellant's legitimate expectation of privacy was merely in the contents of the compartment and not in the lock itself or in the identity of those with access to the compartment. Concluding that the sole and limited purpose of the Government in inserting the key in the padlock was to ascertain whether Lyons had access to the compartment, the majority looks to *United States v. DeBardeleben*, 740 F.2d 440, 444-45 (6th Cir.) (no reasonable expectation of privacy in identity of vehicle, thus permissible to insert key in lock to determine ownership), *cert. denied*, 469 U.S. 1028 (1984), one of several cases cited by the Government which can be characterized broadly as holding that while there may be a reasonable expectation of privacy in an object, there is not necessarily a privacy interest in the identity of the owner of that object. *See also, New York v. Class*, 475 U.S. 106, 114 (1986) (no reasonable expectation of privacy in vehicle identification number (VIN), thus covering VIN with papers not enough to create such an expectation); *United States v. Grandstaff*, 813 F.2d 1353, 1358 (9th Cir.) (inserting key in car door constituted search, but search was reasonable because agents sought only to learn identity of owner, and there is little or no expectation of privacy in the identity of a vehicle's ownership), *cert. denied*, 484 U.S. 837 (1987); *United States v. Portillo-Reyes*, 529 F.2d 844, 852 (9th Cir. 1975) (Wright, J., dissenting) (inspection by insertion of key into car door

for limited purpose of ascertaining ownership does not constitute the beginning of search), *cert. denied*, 429 U.S. 899 (1976); *see also People v. Carroll*, 299 N.E.2d 134, 139, 12 Ill. App. 3d 869 (1973) (no privacy interest infringed when officer merely inserted key into apartment door accessible from common hallway and discovered key turned tumbler), *cert. denied*, 417 U.S. 972 (1974).

All these cases, including *DeBardeleben*, were decided before *Hicks* and accordingly do not reflect the *Hicks* analysis. Moreover, with the exception of the Illinois Appellate Court decision in *People v. Carroll*, the limited analysis of which I find unpersuasive and decline to follow, these cases deal with attempts to identify ownership of automobiles.[1] They rest on the proposition that the expectation of privacy in an automobile is substantially reduced. That proposition is, by now, well established. *See generally New York v. Class*, 475 U.S. at 112-14 (licensed motor vehicles subject to pervasive state regulation, and have range of physical characteristics – such as mobility and visibility – different from fixed dwellings; expectation of privacy therefore reduced); *California v.*

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[1] I note that this court was presented with – but did not resolve – a similar situation outside the automobile context in *United States v. Aguirre*, 839 F.2d 854 (1st Cir. 1988). There one of the searches under consideration flowed from the placement of a key into an apartment lock to determine whether that key fit. When the agent there found the key did fit the lock, he apparently did not actually enter, open the door or peer into the apartment. A warrant was thereafter sought and obtained from the magistrate. *Id.* at 856 & n. 2. We declined, however, to consider whether the search in *Aguirre* was improper because the defendant lacked standing to challenge the search. *Id.* at 859-60.

Carney, 471 U.S. 386, 392 (1985) ("pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate. . . . ").

Special characteristics justify recognition of a lesser expectation of privacy in automobiles (and by extension, in automobile locks which are integral parts of the vehicles): their inherent mobility, their intended function (to transport rather than store things), their visibility on the public highway, and their regulable nature. *See generally United States v. Chadwick*, 433 U.S. at 12-13. More specifically "[a] car owner does not have a reasonable expectation of privacy in his identity as the owner of a particular car, as evidenced by state laws requiring the display of license plates and license plate and owner registrations." *United States v. DeBardeleben*, 740 F.2d at 444. Those characteristics are not present in the case of an immobile storage unit requiring no state licensing and registration or of a padlock obtained for the purpose of securing that unit.[2]

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[2] There have been cases in non-automobile contexts in which the Supreme Court has found a subjective expectation of privacy insufficient to justify Fourth Amendment protection against intrusion. For example, a person's construction of a fence around a marijuana patch in the "hope" it will remain unobserved is different from "a subjective expectation of privacy from *all* observations of his backyard." *California v. Ciraolo*, 476 U.S. 207, 212 (1986) (emphasis in original). Because the ten foot fence in *Ciraolo* did not protect against the "eyes of a citizen or a policeman perched on the top of a truck or a two-level bus," *id.* at 211, it did not protect against the eyes of a

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To be sure, the Supreme Court has treated some intrusions as so minimal as not to constitute a search at all. In *United States v. Place*, 462 U.S. 696 (1983), as the majority notes, the Supreme Court upheld a canine sniff of the outside of luggage at an airport. But the Court in *Place* was careful to emphasize the narrow reach of its holding:

> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here – exposure of respondent's luggage, which was located in a public place, to a trained canine – did not constitute a 'search. . . . '

Id. at 707.

In *Hicks*, the Court distinguished the type of procedure involved in *Place* from impermissible conduct by noting that the canine sniff was "minimally intrusive and

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policeman flying overhead in public space from which the patch was "clearly visible." *Id.* at 213. Similarly, the observation of marijuana plants by the naked eye through openings in the roof and sides of a greenhouse from a police surveillance helicopter flying at a height of 400 feet was held last term not to constitute a search. *Florida v. Riley*, 109 S.Ct. 693 (1989).

By contrast, the internal mechanism of a lock, to which the defendant held the only keys, and which was not "clearly visible" to anyone, is properly the subject of "a subjective expectation of privacy from *all* observations," *California v. Ciraolo*, 476 U.S. at 212.

operational necessities render[ed] it the only practicable means of detecting certain types of crime." 480 U.S. at 327. The investigative procedure here is not minimally intrusive and there is no special operational necessity to justify it.[3]

Moreover, the canine snout in *Place* was not used to penetrate the interior of the luggage and insinuate itself among the articles within that were otherwise shielded from observation. In short, the deployment of the dog's nose along the unconcealed exterior of the luggage in *Place* and the use of the keys here to penetrate and manipulate the interior of the lock are substantially different physical acts which can hardly be classified as part of the same genus of investigative activity.[4]

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[3] Thus, this is not the type of situation that in *United States v. Jacobsen*, 466 U.S. 109 (1984), impelled the Court to rule "[a] chemical field test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy." *Id.* at 123. The test could do nothing more than determine whether the powder was cocaine; it could disclose "no other arguably 'private' fact," and therefore, it "compromise[d] no legitimate privacy interest." *Id.* The reasoning in *Jacobsen* hinged on the combination of the nature of the field test performed and the decision by Congress "to treat the interest in 'privately' possessing cocaine as illegitimate." *Id.*

Such reasoning does not apply to the insertion of a key into a lock. Congress has made no policy statements concerning the legitimacy of " 'privately' possessing" a padlock; nor was the "test" conducted in this case – the insertion of the key and the manipulation of the lock – designed solely and efficiently to disclose the presence of contraband.

[4] While the majority, in its effort to distinguish *Hicks* with *Place*, takes the position that it is not resting its "holding on the

(Continued on following page)

Even assuming, however, that the investigative procedure may have been, as the majority suggests, minimally intrusive, that characterization does not alter the fact that the procedure involved a penetration and manipulation of the concealed portions of an effect which the owner had taken all necessary steps to shield from public observation. Under the teaching of *Hicks*, it was a search within the meaning of the Fourth Amendment.

Neither the majority nor the Government contends that the course of investigation resulting in the insertion of the key and manipulation of the lock was justified by "a compelling necessity for immediate action as [would] not brook the delay of obtaining a warrant." *Curzi*, 867 F.2d at 41 (citations omitted). Lyons had already been placed under arrest, the delay involved in obtaining a

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'plain view' exception to the warrant nor . . . undertak[ing] to enlarge the contours of that exception," *ante*, at 6 n. 2, it is apparent that the majority's perception of a diminished expectation of privacy in the padlock's interior stems in large part from the fact that padlock was located in a "public" place. *See id.* (parenthetical to *United States v. Place* emphasizing that the luggage "was located in public place"); *see also ante*, at 4 (asserting that "public exposure vitiates any reasonable expectation of privacy.") The padlock, however, was only partially exposed to the public. The agents here – like the police in *Hicks* who had exigent circumstances to validate their entry in the apartment – may have had authority to observe the padlock's exterior. But by "taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed" aspects of the interior of the padlock, the agents exceeded such authority as they had to observe matters in plain view, *Hicks*, 480 U.S. at 325, or, more precisely here, in a "public" place – the common area of the storage facility.

warrant "pose[d no] threat to police or the public safety," *id.* at 42, and there was no "*great* likelihood that evidence w[ould] be destroyed if there [was] a delay until a warrant [could] be obtained." *Id.* (emphasis in original).[5] This was not an exceptional circumstance where "special needs, beyond the normal need for law enforcement, ma[d]e the warrant and probable cause requirement impracticable." *Skinner v. Railway Labor Executives Ass'n*, 109 S.Ct. at 1414 (citations omitted).

Having concluded that the insertion of the key into and manipulation of the internal mechanisms of the lock to storage compartment #633 constituted an unwarranted search, I must briefly take up the implications of that conclusion in the context of this case.

II

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Sufficiency of the Affidavit

Without the fruits of the impermissible search of the padlock – which provided evidence that the key seized from the defendant fit the lock to compartment #633 – the affidavit in support of the warrant failed to establish

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[5] Indeed, a warrant was obtained to search the compartment the following afternoon. There was no evidence to suggest that the FBI was sufficiently concerned with the destruction of evidence to take steps to ensure its continued viability in the interim. Had the agents believed exigent circumstances existed, they could have secured the compartment and lock to protect them from any interference pending the issuance of the warrant. *See Place*, 462 U.S. at 701.

probable cause to search that compartment. While the Government provides a lengthy list of grounds providing probable cause for believing that the defendant was a drug dealer familiar with firearms who stored his drugs outside his house, only his reputed association with Larry Gallo – who was the nominal renter of compartment #633 at E-Z/Warwick – and his periodic presence at the E-Z/Warwick facility suggested that Gallo's storage compartment would contain evidence of Lyons' criminal activity. The reputed Gallo/Lyons association evidence was itself not particularly strong. It was described as "source information" which was defined by the government " . . . as maybe information that comes from FBI files with nothing in the files to show where it originates from or perhaps information that comes from an informant who has no proven reliability." Such information was insufficient to establish a sound reason for entering compartment #633 as opposed to any other compartment on the premises. *See generally, Illinois v. Gates,* 462 U.S. 213, 230-35 (1983).

-B-

Alternative Justifications

Because the district court found that the insertion of the key was not a search and that the affidavit demonstrated probable cause given the additional evidence provided by the use of the key, the district court did not have occasion to address two alternative *post-hoc* justifications for the search of the compartment. These are the exceptions from the exclusionary rule for good faith execution of the search and for inevitable discovery of the evidence.

See, e.g., United States v. Leon, 468 U.S. 897, 924 (1984) (good faith exception operates to prevent application of the exclusionary rule upon evidence obtained in objective good faith using a facially valid warrant even if the warrant is subsequently found to have been issued on other than probable cause); *United States v. Silvestri*, 787 F.2d 736, 744 (1st Cir. 1986), *cert. denied*, 108 S.Ct. 2897 (1988) (outlining concerns to be considered in invoking the inevitable discovery exception to the exclusionary rule); *see generally Nix v. Williams*, 467 U.S. 431 (1984); *see also Murray v. United States*, 108 S.Ct. 2529, 2534 (1988) ("The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.") (emphasis in the original).

I would remand to the district court for evaluation of these justifications for the search of compartment #633.

III

Sir Walter Scott reports that "[t]he king's keys are, in law phrase, the crow-bars and hammers used to force doors and locks, in execution of the king's warrant." W. Scott, V Waverly Novels, *The Antiquary* 305 n.* (A. Constable & Co. reprint ed. 1895). The majority here has expanded the definition of the king's keys. That definition now is not limited merely to the devices necessary in execution of a warrant. It includes any set of keys available to those capable of executing the sovereign's warrant

irrespective of whether they have such a writ. Under the majority's definition, keys can be used without a warrant to explore the concealed interiors of the guardian mechanisms people employ in their efforts to make private those places and things over which they exercise dominion and control.[6]

The analytical device used by the majority to achieve this definitional expansion is to conceive the intrusion at issue here as something less than a search or, if a search, a reasonable one. In *Hicks*, the Supreme Court declined "to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a plain-view inspection nor yet a 'full-blown search.' " 480 U.S. at 328-29. In this case, the agents and the courts have generated that creature by extending the plain-view inspection of the exterior of the padlock into an examination of the lock's concealed interior.

I can find no special need – beyond the normal desire of law enforcement agents to use any tool at their disposal – to justify dispensing with the warrant and probable cause requirements of the Fourth Amendment when agents find themselves in possession of keys during their investigative work. The failure of the agents here to

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[6] Elsewhere, Scott describes the efforts made to protect places and effects from use of the king's keys. In *Redgauntlet*, he gives an account of a "door framed to withstand attacks from excisemen, constables, and other personages, considered as worthy to use what are called the King's keys [fn: "In common parlance, a crowbar and hatchet."] 'and therewith to make lockfast places open and patent' . . . " W. Scott XVIII Waverly Novels, *Redgauntlet* 388-89 (Adam & Charles Black Centenary ed. 1871).

obtain a warrant for the use of the key to penetrate a place the defendant sought to maintain as private calls into question the evidence they later obtained as a result of that action. I would accordingly remand the case to the district court for evaluation of whether the *post-hoc* justifications for the use of evidence obtained on the basis of a faulty search are applicable in this case.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1575

UNITED STATES,
Appellee,

v.

JAMES J. LYONS,
Defendant, Appellant.

BEFORE

BREYER, *Chief Judge*,
CAMPBELL, TORRUELLA, SELYA, *CYR, *Circuit Judges*,
and WOODLOCK,** *District Court Judge*.

ORDER OF COURT
Entered: April 23, 1990.

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

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*Judge Selya is recused.

**Of the District of Massachusetts, sitting by designation.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

[cc: Messrs. Grossberg, Madden, Lyons]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

* * * * * * * * *

UNITED STATES

VS. CR. NO. 86-019

JAMES LYONS and
LAWRENCE GALLO

* * * * * * * * *

NOVEMBER 18, 1986
9:30 A.M.

FEDERAL BUILDING
PROVIDENCE, RHODE ISLAND

BEFORE THE HONORABLE FRANCIS J. BOYLE

APPEARANCES:

FOR THE PLAINTIFF: KENNETH MADDEN, ESQ.

FOR DEFENDANT LYONS: RICHARD EGBERT, ESQ.

FOR DEFENDANT GALLO: PAUL DIMAIO, ESQ.

(COMMENCED AT 9:40 A.M.)

THE COURT: Good morning.

MR. EGBERT: Your Honor, may we approach the Bench for a moment?

THE COURT: You could have seen him.

MR. EGBERT: I didn't know. It shouldn't take very long.

THE COURT: Do we need the stenographer?

MR. EGBERT: I don't believe so.

(OFF-THE-RECORD BENCH CONFERENCE)

THE COURT: Now, what is the problem?

MR. EGBERT: Your Honor, please, Special Agent Slowe indicated to me that he was involved in a case before Judge Keaton in the United States District Court for the District of Massachusetts with a similar issue to the case at Bar involving the use of a key, and Judge Keaton apparently suppressed the evidence resulting from the use of that key.

I asked Special Agent Slowe the name of the case and he has told me he forgot it or he can't remember it. I have asked Assistant United States District Attorney Madden. I have also tried to check with all legal periodicals and I made a call to Judge Keaton's clerk. I have checked our local – frankly, called around some local attorneys in Boston to see if they had any knowledge. I think, if Your Honor please, I would like to put Special Agent Slowe on the stand, not to do my legal research –

THE COURT: That is a comment that I made to you at the Bench, that you are asking the FBI to do your legal research for you, is that correct?

MR. EGBERT: I don't intend to have them do my legal research, but I would appreciate this. If there is something out there, if Your Honor please, that would benefit both the Court –

THE COURT: There isn't anything out there because we have checked it at LEXIS and it is obviously not there. If it is not published, I can't use it. Isn't that right?

MR. EGBERT: If it is not published, I believe you cannot use it.

THE COURT: I cannot. I have great respect for Judge Keaton and his ability, but if it is not a published opinion, I cannot rely on it.

MR. EGBERT: I think what it may go to, Your Honor please, if this special agent in fact had knowledge of Judge Keaton's opinion before he got himself involved in using the keys in this particular case, I wonder whether or not that may not impact upon the Court's ruling as to whether or not he then should have known to get a warrant or the like.

Your Honor, I bring it to the Court's attention because, quite frankly, it was something that I couldn't find and if it – frankly, I just couldn't find it through my own inabilities. I didn't want that to impact either the Defendant or the knowledge which the Court would gleen from other cases.

THE COURT: We have checked it with LEXIS and we don't find anything.

MR. EGBERT: I have checked it everywhere else.

THE COURT: You can make your request and it will be denied and you may have an exception. The issue for determination at this point in time is whether or not a statement in an affidavit in support of a search of Locker 633, that a key found in the possession of the Defendant, Mr. Lyons, fit a lock, fit the lock at that Locker No. 633. The evidence is that the locker or bin was rendered in the name of Mr. Lyons' present co-defendant and that it was done so on Mr. Lyons' behalf, that there was no lock on the bin at the time that it was leased, that Mr. Lyons obtained a lock, he doesn't know exactly where, maybe Benny's, and placed it on the locker and locked it and he kept possession of the two keys, the only two keys that opened that lock, that he placed inside the bin some electronic items and somebody else's automobile which although there is no evidence of the size of the bin suggests that it is probably a fairly substantial area, that he had the keys in his possession when he was taken into custody. There appears to be no question but that the government rightfully had possession of the key.

The question is whether or not the insertion of the key in the lock was within the privacy expectations of Mr. Lyons and further whether or not that indeed was a search. The ultimate issue is whether the affidavits supported by probable cause if the information obtained by reason of inserting the key in the lock is suppressed. The Defendant argues vigorously that without the statement that the key fit the lock in Bin No. 633 there was no probable cause established by the affidavit for the search of that bin.

The authorities on this issue are not in complete agreement. The Defendant finds considerable consolation

in the decision of the – a panel of the Ninth Circuit reported in United States versus Porteo Rays, (phonetic), 529 Fed. 2d, 844, in a majority opinion.

The Court in that case considered circumstances in which in an area where illegal aliens were crossing into the United States from Mexico near a housing project at an early morning hour an officer observed to his rear three women and a man crossing through a hole in the fence. They were – these people were ultimately apprehended. The male had a key ring, a residence key and three automobile keys, one each for a Datsun, Opel and a Volkswagon.

The officer knew that in experience in apprehending illegal aliens that there was usually what was called a load car somewhere in the area and went searching for it. He found a parking lot in which there were five automobiles. Now, this was at three o'clock in the morning. No Datsun and no Opel, but a Volkswagon. In the Volkswagon is seated the Defendant, Mr. Rays or he was lying in the Volkswagon. The sequence of events is not terribly clear, but at least this much is clear. The officer called for help and help arrived, tapped on the window and asked the occupant who he was and he told him he was a citizen of El Salvador. The three women who had been taken into custody were citizens of El Salvador. He showed the agent his green alien card and said he was going to Los Angeles.

Now, in the dissenting opinion there is reference to the fact that in this situation where the car was located was hardly the most convenient way to get from where he was to Los Angeles. That isn't further explained, but

pointed out in the dissenting opinion. Either before that or after that the officer tried the key in the door and it worked, and either before or after he tried it in the ignition and it worked. The majority holds that the information obtained by reason of the search of the vehicle must be suppressed and included the information obtained by inserting the key in the door. He said this: "We are satisfied under the reasonable expectation of privacy doctrine of Kats (phonetic) versus United States the insertion of the key in the door of the Volkswagon to see if it fit constituted the beginning of the search," and then they found that even though this was one automobile out of five in a parking lot at three o'clock in the morning where somebody had been taken into custody just a brief distance away there was no probable cause to suspect that the Volkswagon might be the one that the key fit. The dissent said this – this is at Page 852. "The insertion of the key into the door of the vehicle was a minimal intrusion justified by founded suspicion and in furtherance of legitimate interest of proper crime investigation and did not constitute a search within the meaning of the Fourth Amendment, so that the battle ground of a legal dispute here is whether or not the insertion of the key is a search, not whether or not somebody's privacy expectations are defeated by reason of the action of an officer." In United States versus DeBardillo, Southern 40, Fed. 2d, 440, the Sixth Circuit in a unanimous opinion adopts the dissenting points of view in the Ninth Circuit case and quotes at length from the dissenting opinion. At Pages 444, 445, the Court went on to say that, "In this case where there were only three automobiles in the lot and the key for a Chrysler where the key fit the Chrysler.

In the instant case the insertion of the keys into the Chrysler was merely a minimal intrusion justified by a founded suspicion and by legitimate crime investigation. The agent acting under reasonable belief that the car belonged to Defendant did not search the Chrysler, but merely identified it as belonging to Defendant." In that case there was a stolen license plate on the car so the ownership could not be determined from checking the plate. Here there doesn't seem to be any question that the bin had been taken out in somebody else's name so that it wasn't possible to identify the person who had possession of the bin by checking the records of the rental agency, not unlike the stolen plate in the DeBardillo case.

It seems to me that although it is more than one step removed from the process, what happened here was not much more than what would happen if an agent had an address and went to a city directory or to a telephone book and tried to find out who lived at that address. That is not a search certainly. It is true that that is a little closer to the physical building than looking in a city directory or telephone directory, but it seems to me that it is nothing more than identifying under these circumstances ownership or the right to possession of the property. I think that the Sixth Circuit's point of view is the more correct point of view here. I don't believe this is a search. I think this is simply an effort to identify who has possession of the property, and under those circumstances the application to suppress the information concerning the results of the insertion of the key in the lock is denied. Defendants may have an exception Next?